Office-Supreme Court, U.S.
FILED
NOV 5 1966
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~754~~ 25-1967

HOWARD JOSEPH WHITEHILL,

Appellant,

—v.

WILSON ELKINS, President, University of Maryland, and the BOARD OF REGENTS, University of Maryland,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

SANFORD JAY ROSEN
University of Maryland Law School
500 West Baltimore Street
Baltimore, Maryland 21201

ARNOLD M. WEINER
1215 Maryland National Bank Bldg.
Baltimore, Maryland 21202

ELSBETH LEVY BOTHE
41 West Preston Street
Baltimore, Maryland 21201

JOSEPH S. KAUFMAN
1215 Maryland National Bank Bldg.
Baltimore, Maryland 21202

Attorneys for Appellant

LEE M. MILLER
1100 One Charles Center
Baltimore, Maryland 21202
Of Counsel

INDEX

PAGE

Jurisdictional Statement 1

Opinions Below 2

Jurisdiction 2

Statutes, Certificates and Administrative Rules Involved 3

Questions Presented 3

Statement 5

The Questions Are Substantial 14

I. The "Certification of Applicant for Public Employment" and the Maryland Subversive Activities Act of 1949, which requires its execution as a condition precedent to public employment, are unconstitutionally vague, uncertain, and broad in violation of due process of law 14

A. Maryland's Subversive Activities Law and the "Certification of Applicant for Public Employment" now required as a condition precedent to public employment are not protected from constitutional attack by this Court's 1951 decision in *Gerende* v. *Board of Supervisors of Elections* 14

B. Under long standing constitutional principle and recent decisions of this Court declar-

PAGE

ing unconstitutionally vague, uncertain and broad statutes of other states that were virtually identical to the Maryland Subversive Activities Act, particularly with respect to definitions, Maryland's statute is unconstitutionally vague, uncertain and broad on its face and as judicially construed and the "Certification of Applicant for Public Employment" is therefore an invalid condition on public employment 23

C. The definitional and oath provisions of Article 85A being unconstitutionally vague, uncertain and broad, the entire statute must fall notwithstanding the inclusion in it of a standard severability clause 29

II. Loyalty oaths, including Maryland's, that are indiscriminately required of all public employees and applicants for public employment, particularly teachers, are unconstitutional infringements on freedom of expression, belief, association, and academic freedom in violation of the First and Fourteenth Amendments of the United States Constitution 31

III. The Maryland Subversive Activities Act of 1949 and the "Certification of Applicant for Public Employment", required pursuant to it, infringe upon freedom of expression, belief and association, for lack of adequate procedural safeguards, by denying public employment without affording a hearing on the issue of loyalty or

PAGE

subversiveness and by shifting the burdens of proof of loyalty onto applicants, in violation of due process of law 39

IV. The required "Certification of Applicant for Public Employment" and the statute pursuant to which it is given constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution 44

CONCLUSION 46

APPENDICES 1a

Opinion of Two Judges of District Court (Winter and Thomsen) 1a

Special Concurring Opinion of One Judge of District Court (Sobeloff) 15a

Decision and Order 19a

Art. 85A, Md. Code Annot. (1957) 20a

"Certification of Applicant for Public Employment" 33a

Press Release by the Attorney General of Maryland, May 3, 1966 ..... 34a

TABLE OF AUTHORITIES

Cases:

Adler v. Board of Education, 342 U. S. 485 ....31, 33, 34, 35

American Communications Association v. Douds, 339 U. S. 382 ..... 18, 19

In re Anastoplo, 366 U. S. 82 ..... 32, 40

PAGE

Aptheker v. Secretary of State, 378 U. S. 550 .....passim
A Quantity of Books v. Kansas, 378 U. S. 205 40

Baggett v. Bullitt, 377 U. S. 360 .....passim
Bantam Books v. Sullivan, 372 U. S. 58 40
Barenblatt v. United States, 360 U. S. 109 35
Bates v. Little Rock, 361 U. S. 516 37
Beilan v. Board of Education, 357 U. S. 399 32
Brush v. State, Cir. Ct. Lane County, Oregon, Oct. 14, 1965 24

Connally v. General Construction Co., 269 U. S. 385 .. 23
Cramp v. Board of Public Instruction, 368 U. S. 278 .....3, 23, 24, 29, 33
Cummings v. Missouri, 71 U. S. (4 Wall.) 277 44

De Gregory v. Attorney General of New Hampshire, 383 U. S. 825 .....34, 37, 40
Dennis v. United States, 341 U. S. 494 16
Dombrowski v. Pfister, 380 U. S. 479 .....21, 24, 29
Dunne v. United States, 138 F. 2d 137 (8th Cir. 1943) 18

Elfbrandt v. Russell, 384 U. S. 11 .....passim
Elfbrandt v. Russell, 97 Ariz. 140, 397 P. 2d 944 (1965) 21

Florida Lime and Avocado Growers, Inc. v. Jacobsen, 362 U. S. 73 3
Freedman v. Maryland, 380 U. S. 51 43

PAGE

Ex parte Garland, 71 U. S. (4 Wall.) 333 45
Garner v. Board of Public Works, 341 U. S. 716 ..... 28, 34, 35, 45
Georgia Conf. of AAUP v. Board of Regents, 246 F. Supp. 553 (N. D. Ga., 1965) 22, 23, 28
Gerende v. Board of Supervisors of Elections, 341 U. S. 56 ..... passim
Gerende v. Board of Supervisors of Elections, 197 Md. 282, 78 A. 2d 660 (1951) ..... passim
Gibson v. Florida Legislative Committee, 372 U. S. 539 ..... 24, 34, 37
Gojack v. United States, 384 U. S. 702 37
Griswold v. Connecticut, 381 U. S. 479 37

Hammond v. Frankfeld, 194 Md. 487, 71 A. 2d 482 (1950) 11
Hammond v. Lancaster, 194 Md. 462, 71 A. 2d 474 (1950) 11
Heckler v. Shepard, 243 F. Supp. 841 (E. D. Idaho) (1965) 33, 39, 40, 41
Huebech v. City of Baltimore, 205 Md. 203, 107 A. 2d 99 (1954) 29
Hurwitz v. Director's Guild of America, 364 F. 2d 67 (2d Cir. 1966) 24

Kennedy v. Mendoza-Martinez, 372 U. S. 144 41
Keyishian v. Board of Regents, 345 F. 2d 236 (2d Cir. 1965) 33
Keyishian v. Board of Regents, —— F. Supp. —— (W. D. N. Y. Jan. 5, 1966), *prob. juris. noted*, 384 U. S. 998 39

PAGE

Konigsberg v. State Bar of California, 366 U. S. 36 ..... 32, 40
Konigsberg v. State Bar of California, 353 U. S. 252 32

Lamont v. Postmaster General, 381 U. S. 301 ..... 33, 43, 44
Lanzetta v. New Jersey, 306 U. S. 451 23
Lawson v. Housing Authority of Milwaukee, 270 Wis. 269, 70 N. W. 2d 605 (1955) 34, 37
Lerner v. Casey, 357 U. S. 468 32

Marcus v. Search Warrant, 367 U. S. 717 40-41

NAACP v. Button, 371 U. S. 415 29
Nelson v. Los Angeles County, 362 U. S. 1 ..... 32, 40
New York Times Co. v. Sullivan, 376 U. S. 254 34
Nostrand v. Little, 362 U. S. 474 40
Noto v. United States, 367 U. S. 290 ..... 19, 24, 25

Pennsylvania v. Nelson, 350 U. S. 497 9
Poe v. Ullman, 367 U. S. 497 38

Railroad Retirement Board v. Alton R.R., 295 U. S. 330 29

Scales v. United States, 367 U. S. 203 ..... 19, 24, 25
Schneider v. Rusk, 377 U. S. 163 ..... 33, 41
Shelton v. Tucker, 364 U. S. 479 ..... 3, 24, 31, 33, 38
Sherbert v. Verner, 374 U. S. 398 ..... 33-34, 40
Shub v. Simpson, 196 Md. 177, 76 A. 2d 332 (1950) ..... passim
Slochower v. Board of Education of New York, 350 U. S. 551 ..... 40, 41

PAGE

Smith v. California, 361 U. S. 147 ..... 23, 43
Speiser v. Randall, 357 U. S. 513 ..... 3, 34, 41, 42, 43, 44
Sweezy v. New Hampshire, 354 U. S. 234 ..... 3, 36, 37

Thornhill v. Alabama, 310 U. S. 88 29
Torcasso v. Watkins, 367 U. S. 88 ..... 33, 40, 41

United States v. Brown, 381 U. S. 437 ..... 19, 34, 45
United States v. Dennis, 183 F. 2d 201 (2d Cir. 1950) 18, 19, 25
United States v. Lovett, 328 U. S. 303 45

West Virginia State Board of Education v. Barnette, 319 U. S. 624 40
Wieman v. Updegraff, 344 U. S. 183 ..... 33, 36, 41
Winters v. New York, 333 U. S. 507 23

Yates v. United States, 354 U. S. 298 ..... 19, 25

Statutes:

Federal Constitutional Provisions:

Article I, Section 10, U. S. Const. 2, 5, 44
First Amendment, U. S. Const. 4, 31, 34, 36, 38, 40
Fourteenth Amendment, U. S. Const. 2, 4, 31

Federal Statutes:

18 U. S. C. § 2385 9
28 U. S. C. § 1253 3
28 U. S. C. § 1343 2

PAGE

28 U. S. C. § 2201 2

28 U. S. C. § 2202 2

28 U. S. C. § 2281 2

28 U. S. C. § 2284 2

The Landrum-Griffin Act, 29 U. S. C. §§ 401-531 45

42 U. S. C. § 1983 2

State Constitutional Provisions, Statutes, Administrative Rules and Certificates:

Art. 15, § 11, Maryland Constitution 5, 16, 17

Art. 37, Maryland Declaration of Rights 16

Chapter 721 of the Acts of Maryland of 1947 5

Senate Joint Resolution No. 2, 1948 LAWS OF MD. 158 (1948 extraordinary session) 6, 30

1949 LAWS OF MARYLAND 96-97 (Preamble to Art. 85A) 6, 30

Ch. 310 of the Maryland Acts of 1949 6

§ 3(c), Art. 10, Md. Code Annot. (1957) 27

Article 85A, Md. Code Annot. (1957) .....passim

§ 1, Art. 85A, Md. Code Annot. (1957) 2, 3, 5, 7, 10, 25, 30

§ 2, Art. 85A, Md. Code Annot. (1957) 8, 9

§ 3, Art. 85A, Md. Code Annot. (1957) 8, 25

	PAGE
§ 4, Art. 85A, Md. Code Annot. (1957)	8
§ 5, Art. 85A, Md. Code Annot. (1957)	8
§ 6, Art. 85A, Md. Code Annot. (1957)	9
§ 7, Art. 85A, Md. Code Annot. (1957)	9
§ 8, Art. 85A, Md. Code Annot. (1957)	9
§ 9, Art. 85A, Md. Code Annot. (1957)	9
§ 10, Art. 85A, Md. Code Annot. (1957)	2, 3, 5, 9, 25
§ 11, Art. 85A, Md. Code Annot. (1957)	2, 3, 5, 9, 10, 25, 28, 41
§ 12, Art. 85A, Md. Code Annot. (1957)	9
§ 13, Art. 85A, Md. Code Annot. (1957)	2, 3, 5, 9, 25, 41
§ 14, Art. 85A, Md. Code Annot. (1957)	10, 25
§ 15, Art. 85A, Md. Code Annot. (1957)	10, 14, 16, 25
§ 16, Art. 85A, Md. Code Annot. (1957)	10
§ 17, Art. 85A, Md. Code Annot. (1957)	2, 3, 5, 10, 22
§ 18, Art. 85A, Md. Code Annot. (1957)	2, 3, 5, 10, 29
§ 19, Art. 85A, Md. Code Annot. (1957)	10
§ 435, Art. 27, Md. Code Annot. (1957)	22
§ 439, Art. 27, Md. Code Annot. (1957)	22
"Certification of Applicant for Public Employment"	passim
News Release of the Attorney General of Maryland, May 3, 1966	3

PAGE

Rule Second, Rules Governing Registration of Law Students and Admission to the Bar of Maryland, 9A Md. Code Annot. p. 233 (1957) 27

Ariz. Rev. Stat. § 38-231, subs. G, as amended 1961, Ch. 108, § 5 21

Rev. Code Wash. Ann., Ch. 9.81 (1961) 19

Rev. Code Wash. Ann., Sec. 9.81.083 (1961) 19

Miscellaneous:

Amsterdam, *The Void for Vagueness Doctrine,* 109 U. Pa. L. Rev. 67 (1960) 23

Commager, *Is Freedom an Academic Question?,* Saturday Review, June 20, 1964, 54 35

Educational Freedom in an Age of Anxiety (Hullfish, ed., 1953) 36

Lazarsfeld and Thielens, The Academic Mind (1958) 36, 38

MacIver, Academic Freedom in Our Time (1955) 36

Morris, *Academic Freedom and Loyalty Oaths,* 28 Law and Contemporary Problems 487 (1963) 36

Morris, *Baggett v. Bullitt: Scienter & "Guiltless Knowing Behavior",* 1 Law in Transition Q. 185 (1964) 24

Murphy, *Academic Freedom—An Emerging Constitutional Right,* 28 Law and Contemporary Problems 447 (1963) 36, 41

PAGE

Prendergast, *Maryland: The Ober Anti-Communist Law* in THE STATES AND SUBVERSION 140 (Gellhorn ed. 1952) 6, 30, 38

REPORT OF THE COMMISSION ON SUBVERSIVE ACTIVITIES TO GOVERNOR WILLIAM PRESTON LANE, JR., AND THE MARYLAND GENERAL ASSEMBLY (January, 1949) 30

SUTHERLAND, STATUTORY CONSTRUCTION (3rd Ed. 1943) 29, 30

Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 CALIF. L. REV. 212 (1966) 46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. .....

HOWARD JOSEPH WHITEHILL,

Appellant,

—v.—

WILSON ELKINS, President, University of Maryland, and the BOARD OF REGENTS, University of Maryland,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

JURISDICTIONAL STATEMENT

Appellant appeals from the final judgment of the United States District Court for the District of Maryland entered on September 8, 1966, dismissing the Complaint filed below and holding that Article 85A of the Maryland Code Annotated (1957), the Subversive Activities Act of 1949, and the "Certification of Applicant for Public Employment" required by it as a condition precedent to public employment, and the interpretation of the Attorney General of Maryland of May 3, 1966 as to the scope of that requirement, are constitutional, and Appellant submits this statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinion and order of the United States District Court for the District of Maryland and the special concurrence of Judge Sobeloff were rendered on September 8, 1966, and are not yet officially reported. The opinions and the judgment and final order in this case are set out in the Appendix *infra*, at pp. 1a-19a.

Jurisdiction

This class action was instituted on August 19, 1966 under Section I of the Fourteenth Amendment of the Constitution of the United States, under Article I, Section 10, Paragraph 1 of the Constitution of the United States; and under Sections 1343, 2201 and 2202 of Title 28 and Section 1983 of Title 42 and Sections 2281 and 2284 of Title 28 of the United States Code. The court below was asked to pass on the constitutionality of Article 85A of the Md. Code Annot. (1957), the Subversive Activities Act of 1949, particularly Sections 1, 10, 11, 13, 17, 18, and the "Certification of Applicant for Public Employment" required pursuant to it according to the interpretation of the certification requirement most recently made by the Attorney General of Maryland. The relief prayed was an injunction against the Appellees, each of whom is either an official body or officer of the State of Maryland, from enforcing the statutes and rulings complained of, and, also "such other and further relief as to the Court may seem just and proper."

By decision filed on September 8, 1966, the District Court gave judgment for the Appellees and denied all relief re-

quested by the Appellant. Notice of appeal was filed in the District Court for the District of Maryland on September 13, 1966. Jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1253.

The following decisions sustain the jurisdiction of this Court to review the judgment in this case on direct appeal: *Baggett* v. *Bullitt*, 377 U. S. 360; *Shelton* v. *Tucker*, 364 U. S. 479; *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U. S. 73. And see, *Sweezy* v. *New Hampshire*, 354 U. S. 234; *Speiser* v. *Randall*, 357 U. S. 513; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278.

Statutes, Certificates and Administrative Rulings Involved

The provisions of the law involved in this case are: Article 85A, Md. Code Annot. (1957), the Maryland Subversive Activities Act of 1949, particularly Sections 1, 10, 11, 13, 17 and 18; the "Certification of Applicant for Public Employment" required of Appellant; and the May 3, 1966 ruling of the Attorney General of Maryland as to the scope of the certification requirement. Because of their length, the text of the statutory provisions, certificates, and rulings, involved are set out in the Appendix, *infra*, pp. 20a-34a.

Questions Presented

1. In the light of recent decisions of this Court, was the District Court correct in ruling that the "Certification of Applicant for Public Employment" which Appellant refused to execute, and the Maryland Subversive Activities

Act of 1949, which requires execution of that Certification as a condition precedent to public employment, are insulated from constitutional attack by this Court's decision in *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56 (1951)?

2. Are the certification and the statute under which it is compelled unconstitutionally vague, uncertain and broad in violation of due process of law?

3. If the definitional and certification provisions of the Maryland Subversive Activities Law of 1949 are unconstitutionally vague, broad and indefinite, does the entire statute fall notwithstanding the inclusion in it of a standard severability clause?

4. Does Maryland's loyalty "Certification", which is indiscriminately required of all public employees and applicants for public employment, particularly of teachers, unconstitutionally infringe the freedoms of expression, belief, association and academic freedom in violation of the First and Fourteenth Amendments to the United States Constitution?

5. Do the Maryland Subversive Activities Act of 1949 and the "Certification of Applicant for Public Employment" required pursuant to it, infringe upon freedom of expression, belief and association, for lack of adequate procedural safeguards, by denying public employment without affording a hearing on the issue of loyalty or subversiveness and by shifting the burdens of proof of loyalty onto applicants, in violation of due process of law?

6. Do the "Certification of Applicant for Public Employment" and the statute pursuant to which it is required constitute a bill of attainder in violation of Article 1, §10 of the United States Constitution?

Statement

This suit challenges the constitutionality of particularly Sections 1, 10, 11, 13, 17 and 18 of Article 85A, MD. CODE ANNOT. (1957), which are sections of the Maryland Subversive Activities Act of 1949, and the "Certification of Applicant for Public Employment" required pursuant to it and the ruling of the Attorney General of Maryland of May 3, 1966 which most recently interpreted the scope of this requirement.

By Chapter 721 of the Acts of 1947, the General Assembly of Maryland proposed an amendment to the Constitution of Maryland by adding a new Section 11 to Article 15 thereof, which reads as follows:

> "No person who is a member of an organization that advocates the overthrow of the government of the United States or of the State of Maryland through force or violence shall be eligible to hold any office, be it elective or appointive, or any other position of profit or trust in the government of or in the administration of the business of this State or any county, municipality, or other political sub-division of this state."

The proposed amendment was approved by a vote of the people of Maryland on November 2, 1948.

At a special session of the General Assembly of Maryland in 1948, Senate Joint Resolution No. 2 was passed, see 1948 LAWS OF MD. 158 (1948 extraordinary session), directing the Governor to appoint a committee on subversive activities to study the laws of the United States, and of the several states, and to formulate and prepare a legislative program for the protection of democratic principles of government and ideals and for the exposure and expurgation of subversive activities in the State of Maryland. Pursuant to this resolution, the Governor appointed a "Commission on Subversive Activities", with Frank B. Ober, Esquire, as chairman. The report of the commission, covering 115 pages, was submitted to the Governor on September 30, 1948, with an attached draft of a proposed bill entitled, "Sedition and Subversive Activities". The legislature enacted the substance and most of the detail of the bill proposed by the commission and it became Chapter 86 of the Acts of 1949, now codified as Article 85A of the ANNOTATED CODE OF MARYLAND (1957). By Chapter 310 of the Acts of 1949, Chapter 86 was declared an emergency measure, and took effect on the date of its passage, April 22, 1949. On the background of the law, see Prendergast, *Maryland: The Ober Anti-Communist Law,* in THE STATES AND SUBVERSION 140 (Gellhorn ed. 1952). This law is popularly known as the "Ober Law" after the chairman of the Commission.

In a preamble to the Act, see 1949 LAWS OF MARYLAND 96-97, the General Assembly declared its findings, *inter alia,* that there existed a world-communist movement, under the domination of a foreign power, "having as its objective the establishment of totalitarian dictatorship in all parts

of the world under its control"; that such dictatorship is "characterized by the liquidation of all political parties other than the Communist party, the abolishment of free speech, free assembly and freedom of religion, and is a complete antithesis of the American constitutional form of government"; that other subversive organizations have other similar objectives; that the methods of subversive persons and subversive organizations "include treachery, deceit, infiltration into goverment, and other institutions, espionage, sabotage, terrorism, and other unlawful means"; that "the methods adopted by subversive persons and organizations render it imperative that the loyalty of persons entering the public employment of the State of Maryland or any of its political sub-divisions be definitely established"; and that "the Communist movement plainly presents a clear and present danger to the United States Government and to the" government of the State of Maryland and their political subdivisions.

Although made up of nineteen sections, the Ober Act, Article 85A, is an integrated whole establishing a regulatory scheme to guard against "Sedition and Subversive Activities."

Section 1 of Article 85A sets forth the definitions which form the basis for the entire scheme. Defined therein are the terms "organization", "subversive organization",[1] "for-

[1] "'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, by revolution, force, or violence."

eign subversive organization",[2] "foreign government", and "subversive person."[3]

Section 2, not directly at issue in this case, but relevant to it, makes it a felony "knowingly and willfully" to engage in certain defined subversive activities. Section 3 makes it a felony knowingly to remain or become a member of a subversive organization. Section 4 disqualifies persons found guilty under Sections 2 or 3 from holding public office, standing for election, or voting in any election in Maryland. Section 5 declares unlawful and provides for the dissolution of "subversive organizations" and "foreign subversive organizations". At least so far as these provisions deal with subversion of the United States Government, it is clear that they have been superseded by the

---

[2] "'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Maryland, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization or individual; but does not and shall not be construed to mean an organization the bona fide purpose of which is to promote world peace by alliances or unions with other governments or world federations, unions or governments to be effected through constitutional means."

[3] "'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the State of Maryland, or any political subdivision of either of them, by revolution, force or violence; or who is a member of a subversive organization or a foreign subversive organization."

Smith Act, 18 U. S. C. §2385. *Pennsylvania* v. *Nelson*, 350 U. S. 497. See also, Commentator's note to Section 2 of Art. 85A, MD. CODE ANNOT. (1957).

Sections 6 through 9 deal with the appointment of an Assistant Attorney General to be "in charge of subversive activities", the collection of evidence and information with respect to subversion and appointment of additional personnel for the task; the keeping of relevant records and reports, particularly "such records as may reflect on the loyalty of any resident of this State"; and the use of Grand Juries for purposes of inquiring into violations of the Article.

Section 10 declares that "no subversive person, as defined in this article, shall be eligible for" public employment or appointment. Section 11 requires each governmental board, agency, or body which appoints, employs or supervises appointment or employment of public officials or employees to establish procedures for ascertaining that all such appointees or employees are not "subversive persons". "[T]eachers and other employees of any public educational institution in this State" are the only such appointees or employees given specific mention. In addition, the section provides that applicants "shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury". Section 12 makes the loyalty provisions inapplicable to laborers.

Section 13 required every state employee employed as of June 1, 1949, "to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this article". This quoted statement is then followed by

the definition of "subversive person" given in Section 1. See *supra,* p. 8, note 3. The Section further provided that an employee who failed or refused "to execute such a statement or who admits he is a subversive person as defined in this article shall immediately be discharged". While earlier loyalty cards referred to Article 85A, without specification of a particular section, as their legislative authority, the "Certification of Applicant for Public Employment" demanded by the University officials in this case, set forth, *infra,* in the Appendix at p. 33a, states that it is required by this "Paragraph" 13. At the hearing below the Attorney General said that the loyalty certificates required by some other state agencies refer generally to Article 85A (Tr. 40-41). Authority for requiring the certification here at issue lies primarily under Section 11.

Section 14 provides that reasonable ground for believing a person is a "subversive person" is cause for discharge and it makes provision for administrative hearing and judicial review in such cases. Section 15 requires candidates for election to any public office to file affidavits that they are not "subversive persons". Section 16 requires private institutions of learning receiving public funds to report on the procedures and efforts that they undertake to remain free of employees who are "subversive persons". Section 17 renders misstatements by public employees and applicants for public employment or appointment subject to statutory penalties of perjury. Section 18 is a standard severability clause. Section 19 sets forth the short title of the Act.

Shortly after passage, a number of suits were brought challenging the Ober Law on constitutional grounds. It was authoritatively construed by the Court of Appeals of

Maryland and upheld against all constitutional attack. *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d 332 (1950), *appeal dismissed,* 340 U. S. 881; *Gerende* v. *Board of Supervisors of Elections,* 197 Md. 282, 78 A. 2d 660 (1951), *aff'd per curiam,* 341 U. S. 56. See also *Hammond* v. *Lancaster,* 194 Md. 462, 71 A. 2d 474 (1950); *Hammond* v. *Frankfeld,* 194 Md. 487, 71 A. 2d 482 (1950). On appeal in the *Gerende* case, which involved the affidavit required of candidates for public office, this Court affirmed, relying upon its interpretation of the Court of Appeals of Maryland's construction of the Maryland statute in *Shub.*

Since in a motion to dismiss all facts well pleaded in the complaint are accepted, the facts in this case are as follows:

The Appellant herein, Howard Joseph Whitehill, Jr., is presently a resident of Chestertown, Maryland and is engaged in teaching creative writing at the Johns Hopkins University in Baltimore and in the writing of works of fiction and of non-fiction. He is, furthermore, a practicing member of the Religious Society of Friends, known also as Quakers. The Appellees are Wilson Elkins who is the President of the University of Maryland, and the Board of Regents of the University. They are fully and completely responsible for supervising, directing and otherwise controlling, so far as the University's personnel is concerned, the enforcement of the requirement under Article 85A that all applicants for employment with and all employees of the University execute as a condition precedent to employment some certification of loyalty and particularly the "Certification of Applicant for Public Employment" that was required of Appellant.

As a consequence of an understanding with representatives of the University of Maryland at College Park, Maryland, particularly Dr. Charles E. Murphy, head of the English Department of the University, the Appellant executed a written contract for his appointment as a visiting lecturer in English during the academic year of 1966 to 1967. Under the terms of the contract he was to be paid $7,000.00 on a ten month basis starting in September 1966; and he agreed to spend one day a week at the College Park campus each semester, teaching two creative writing classes in 75 minute sessions, and making additional conference time available for consultation with students.

By a letter dated July 6, 1966, and signed by Dr. Murphy, the Appellant received the contract and certain additional papers, including what was denominated a "Certification of Applicant for Public Employment", which contained a loyalty test and which he was instructed had to be signed as a condition precedent to his appointment. The Appellant executed the contract, and by letter of July 11, 1966, he mailed it to Dr. Murphy, declining in a separate letter enclosed therewith, however, to execute the "Certification of Applicant for Public Employment". In his letter of explanation the Appellant offered to serve without pay pending the adjudication of the issues in this case. Dr. Murphy by a letter of July 18, 1966, advised the Appellant that the University of Maryland would not accept his services without the required certification having been executed and filed by him.

On August 19, 1966, the Appellant filed suit in the United States District Court for the District of Maryland requesting a preliminary and permanent injunction, declaratory judgment, and "such other and further relief as to the

Court may seem just and proper". A statutory three-Judge District Court was convened, and a hearing was conducted on September 1, 1966 on the State's motion to dismiss the complaint for failure to state a cause of action upon which relief could be granted. The State's motion was filed on August 31, 1966. On September 8, 1966, the District Court issued its order and opinion dismissing the complaint and resolving each of the constitutional issues the Appellant raised against him, primarily on the ground that this Court's decision in *Gerende* v. *Board of Supervisors of Elections*, 341 U. S. 56, was controlling on the issues in this case even though, strictly speaking, *Gerende* directly involved the candidates' oath requirement under Section 15, and not, as here, the employees' oath requirement under Sections 11 or 13. Judge Sobeloff, concurring specially wrote a separate opinion in which he indicated his doubts as to the continued vitality of the *Gerende* decision in the light of subsequent decisions of this Court and in ending said ". . . despite the doubts engendered by the course of subsequent adjudications, I think the contentions made by the plaintiff here are more properly addressed to the Supreme Court. I am obliged, therefore, to join in today's order of dismissal rather than anticipate the abandonment of *Gerende*" (App. 18a). Notice of Appeal was filed on September 13, 1966.

The Questions Are Substantial

I.

The "Certification of Applicant for Public Employment" and the Maryland Subversive Activities Act of 1949, which requires its execution as a condition precedent to public employment, are unconstitutionally vague, uncertain, and broad in violation of due process of law.

A. Maryland's Subversive Activities Law and the "Certification of Applicant for Public Employment" now required as a condition precedent to public employment are not protected from constitutional attack by this Court's 1951 decision in *Gerende* v. *Board of Supervisors of Elections.*

Judge Winter for the majority in the District Court below said, " . . . what the Supreme Court said in the *Gerende* case is determinative here." Appendix, *infra,* p. 8a. It is Appellant's contention, however, that decisions of this Court subsequent to *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56, have destroyed the underpinnings of that case and if this Court has not yet done so it should reconsider and overrule that decision.

In *Gerende* this Court upheld the requirement of Section 15 of Article 85A of the MD. CODE ANNOT. (1957), pursuant to which candidates for public office must submit affidavits of loyalty. This affirmance was based upon the Maryland Court of Appeals' earlier decision in *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d 332 (1950), *appeal dismissed,* 340 U. S. 881. Specifically this Court said:

> "We read that decision to hold that to obtain a place on the Maryland ballot a candidate need only make oath

that he is not a person who is engaged 'in one way or another in the attempt to overthrow the government *by force or violence*', and that he is not knowingly a member of an organization engaged in such an attempt. —— Md. at ——, 76 A. 2d at 338. At the bar of this Court the Attorney General of the State of Maryland declared that he would advise the proper authorities to accept an affidavit in these terms as satisfying in full the statutory requirements. Under these circumstances and with this understanding, the judgment of the Maryland Court of Appeals is *affirmed.*" *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56-57.

During the argument below in this case, Judge Winter made the following comment: "Of course, the Supreme Court of the United States said they read the Shub case as saying that only the shortened form of oath was required. I find it a little difficult to reach the same conclusion, reading the Shub case, just on my own. . . ." (Tr. 9). Appellant respectfully agrees that the *Shub* decision cannot properly be read to support the restrictive interpretation of the oath requirement that was urged upon this Court in *Gerende* by the Attorney General of Maryland. Alternatively, it is Appellant's position that the interpretation accepted by this Court in 1951 is much less limited than initially thought and, when judged by current standards, the statute and oath requirement as interpreted are unduly vague, uncertain and broad.

The Plaintiffs in *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d 332 (1950), *appeal dismissed,* 340 U. S. 881 and *Gerende* v. *Board of Supervisors of Elections,* 197 Md. 282, 78 A. 2d 660 (1951), *aff'd per curiam,* 341 U. S. 56, sought to run

for public office in Maryland without filing the affidavits of loyalty required by Section 15 of the Ober Law. In *Shub*, where the Maryland Court of Appeals rendered its only full opinion considering the Ober Law on its merits, the main ground for attack was that the Section required an oath of office additional to the one provided by the Maryland Constitution and was therefore invalid under Article 37 of the Maryland Declaration of Rights which prohibits the legislature from prescribing additional oaths of office. The Maryland Court of Appeals, however, viewed Section 15 of the Act as requiring not an oath but merely an affidavit of qualification for office implementing Article 15, Section 11 of the Maryland Constitution which reads: "No person who is a member of an organization that advocates the overthrow of the Government of the United States or of the State of Maryland through force or violence shall be eligible to hold any [public] office . . . " The plaintiffs in *Shub* contended that the affidavit required under Section 15 of the Act for candidates, identical to the oath prescribed in Section 13 for public employees, went far beyond Article 15, Section 11 of the Constitution, for it encompassed committing, attempting to commit, advocating, abetting, or advising alteration of the government by peaceful revolution and also membership in foreign organizations the purposes of which are to overthrow or alter the government by means not involving force or violence.

Upholding the legislation, the Maryland Court of Appeals, consistent with its interpretation of the test of "clear and present danger" already enunciated by the federal Courts of Appeals, see 196 Md. at 195, 76 A. 2d at 340, and about to be adopted by this Court in *Dennis* v. *United States*, 341 U. S. 494, ruled that:

> *"A person who advocates the overthrow of the Government of the United States, or of this State, through force or violence* could scarcely in good faith, take the constitutional oath of office prescribed by Article 1, Sec. 6, and the Legislature has taken pains to see that the name of any such unqualified person shall not appear on the ballot." 196 Md. at 190, 76 A. 2d at 337 (Emphasis supplied).

Specifically the court held that the purpose of Article 85A, the Ober Law, was identical with and therefore not inconsistent with that of Section 11 of Article 15 of the Maryland Constitution, which purpose the court said was "to prevent infiltration in our state, county, or municipal governments of persons who are engaged in one way or another in the attempt to overthrow the government *by force or violence.*" *Shub v. Simpson,* 196 Md. 177, 192, 76 A. 2d 332, 338 (1950) (Emphasis in original).

Having reconciled the Ober Law to the Maryland Constitution, the Maryland Court of Appeals also addressed the federal Constitutional questions.

> "These grounds [said the Court] are that it [Article 85A] abridges the fundamental rights of freedom of speech, press and assembly, that it is vague and indefinite and therefore violates due process, that it is a bill of attainder, that it attempts to establish guilt by association, and other similar contentions. It is contended that the act is basically inseparable in its provisions, and, therefore, it should be stricken down in its entirety." 196 Md. at 195, 76 A. 2d at 339.

Responding to these arguments, the court said that "[t]he purpose of Chapter 86 [Article 85A], as shown by its title

and throughout its provisions, is not to restrict freedom of speech or thought, nor does it do so." 196 Md. at 192, 76 A. 2d at 338. And relying upon the federal Court of Appeals' decisions in *Dunne* v. *United States,* 138 F. 2d 137 (8th Cir. 1943), *cert. denied,* 320 U. S. 790; *United States* v. *Dennis,* 183 F. 2d 201 (2d Cir. 1950), *aff'd,* 341 U. S. 494; and this Court's decision in *American Communications Association* v. *Douds,* 339 U. S. 382, the Maryland court concluded that:

> "We do not think it necessary to repeat what has been said in these cases. *We are unable to find that the statute before us, on its face, violates any of the fundamental rights of appellants, or that it is susceptible of an interpretation which makes it necessary for the courts to strike it down.* On the contrary, there is a presumption in favor of its validity, and there has been presented to us no argument which impairs or rebuts that presumption." 196 Md. 177, 195, 76 A. 2d 332, 340. (Emphasis supplied.)

Appellant believes it is evident from the Maryland Court of Appeals' opinion that that court was of the view that it had not, by judicial construction, significantly limited or narrowed the terms of the statute as they appear on its face. First, this is the most reasonable interpretation of the words, italicized above, chosen by the court to declare that neither on its face nor by interpretation did the statute violate the federal Constitution. Second, this conclusion is compelled by the fact that the statute was held to be directed at persons who advocate "the overthrow of the Government of the United States, or of this State, through force or violence . . ." 196 Md. at 190, 76 A. 2d at 337, and "persons who are engaged in *one way or another* in the

attempt to overthrow the government *by force or violence,*" 196 Md. at 192, 76 A. 2d at 338 (First emphasis supplied), without limitation of the scope and coverage of the statute to advocacy of action or *active, intentional,* knowing membership in organizations having the purpose of overthrowing or advocating action to overthrow the government. Third, this is made finally clear by the Maryland court's reliance on the Circuit Court decision in *United States* v. *Dennis,* 188 F. 2d 201 (2d Cir. 1950), *aff'd,* 341 U. S. 494, and this Court's decision in *American Communications Association* v. *Douds,* 339 U. S. 382, the holdings of both of which have since been significantly limited by this Court. See, *e.g., Yates* v. *United States,* 354 U. S. 298; *Scales* v. *United States,* 367 U. S. 203; *Noto* v. *United States,* 367 U. S. 290; *United States* v. *Brown,* 381 U. S. 437. See particularly, *Baggett* v. *Bullitt,* 377 U. S. 360, 370 n. 8, where the Court said that in *Yates* it "made quite clear exactly what all the above terms [of the Smith Act] do and do not proscribe: '[T]he Smith Act reaches only advocacy of action for overthrow of government by force and violence.'" See also *Elfbrandt* v. *Russell,* 384 U. S. 11; *Aptheker* v. *Secretary of State,* 378 U. S. 500.

In *Baggett* this Court reviewed and declared unconstitutionally vague, broad and indefinite Washington's subversive activities law and the loyalty oath required by it. The Washington law was copied from Maryland's Ober Law and its essential provisions were identical to it. Rev. Code Wash. Ann. ch. 9.81 (1961). See *Baggett* v. *Bullitt,* 377 U. S. 360, 362-64; *Id.* at 382 (Clark and Harlan, *JJ.*, dissenting).[4] *Baggett* came to this Court on appeal from the

[4] There is an exception, insignificant here. The Washington Law expressly declared the Communist Party to be a subversive organization, Rev. Code Wash. Ann. Sec. 9.81.083; 377 U. S. at 363 n. 1.

decision of a statutory three judge District Court. 215 F. Supp. 439 (W. D. Wash. 1963). The District Court had construed the Washington Law and oath requirement in conformity with the construction of the similar Maryland statute in *Shub* v. *Simpson,* 196 Md. 177, 76 A. 2d 332 (1950) and *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56. See 215 F. Supp. at 446 n. 8, 447 n. 16, 449 n. 24, 450. Nevertheless, this Court, finding the statute too vague, struck it down.[5] Justice Clark, joined by Justice Harlan, in dissent lamented the passing of *Gerende,* saying that it "is overruled. . . ." 377 U. S. at 382. More in full, Justice Clark said:

> "It has been contended that the crucial section of Maryland's Ober Act, that which is identical to the Washington Act, was not before the Court in *Gerende,* but a review of the record in that case conclusively demonstrates to the contrary. Further, while the *Gerende* opinion was stated with a qualification, the fact remains that the Court approved the judgment of the Maryland court and rejected the argument that the Act was unconstitutionally vague." 377 U. S. at 382 note.

In apparent response the majority said that *Gerende* had merely upheld Maryland's oath and not its underlying

---

The District Court in the case at bar also found that "the Washington definition [of subversive organization] included a limitation, absent in the Maryland definition, that membership be knowing." Appendix *infra* p. 10a. However, in *Gerende* this Court was evidently of the view that precisely that limitation was incorporated into the Maryland law. 341 U. S. 56-57.

[5] The Court said: "Appellants contend in this Court that the oath requirements and the statutory provisions on which they are based are invalid on their face because their language is unduly vague, uncertain and broad. We agree with this contention. . . ." 377 U. S. at 366.

statute, 377 U. S. at 368-69 n. 7, but as the Court held last year in *Elfbrandt* v. *Russell*, 384 U. S. 11, a loyalty oath, no matter how innocuous on its face,[6] cannot be passed upon in isolation, and it must be read together with its underlying and authorizing statute. See also *Dombrowski* v. *Pfister*, 380 U. S. 479, 493-94 (1965).[7]

The point that the Maryland oath must be read and passed upon with the underlying statute is further illuminated when note is taken of the fact that on the "Certification of Applicant for Public Employment", now administered by the Appellees, is printed, "Required by Law (Art. 85A, Paragraph 13, Annotated Code of Maryland, 1957)", see Appendix, *infra* at p. 33a. The conscientious person who himself or by counsel refers to and reads the authorizing law is squarely confronted with the statutory terms and definitions that in *Baggett* this Court declared uncon-

---

[6] The Oath in *Elfbrandt* was in the following form:

"'State of Arizona, County of _____ I, _____
(type or print name)
do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution and laws of the State of Arizona; that I will bear true faith and allegiance to the same, and defend them against all enemies, foreign and domestic, and that I will faithfully and impartially discharge the duties of the office of _____ (name of office) _____ according to the best of my ability, so help me God (or so I do affirm).' A. R. S. § 38-231, subs. G, as amended Laws 1961, Ch. 108, § 5." *Elfbrandt* v. *Russell*, 97 Ariz. 140, 397 P. 2d 944, 945 n. 2 (1965).

[7] The Court there said: "The statutory definition of a 'subversive organization' . . . incorporated into the offense [under Louisiana law] . . . is substantially identical to that of the Washington statute which we considered in *Baggett* v. *Bullitt*, 377 U. S. at 362, 363 n. 1. *There the definition was used in a state statute requiring state employees to take an oath as a condition of employment. We held that the definition, as well as the oath based thereon, denied due process because it was unduly vague, uncertain and broad.*" 380 U. S. at 493-94. (Emphasis supplied.)

stitutionally vague, uncertain and broad on their face. The oath in *Elfbrandt* v. *Russell*, 384 U. S. 11, quoted *supra* in note 6, contained a similar citation to the underlying Arizona statute. And with this as the only visible nexus between the oath and the statute, this Court would not read and pass upon the oath without the statute.

The Maryland certification has an additional nexus between the oath and the statute not apparent on the face of the Arizona oath. It requires affiants to make the statement that: "I further certify that I understand the aforegoing statement is made subject to the penalties of perjury prescribed in Article 27, Section 439 of the Annotated Code of Maryland (1957 edition)" (App. 33a). As Judge Sobeloff said below in his special concurrence, "I am inclined to agree with the plaintiff that the prescribed oath or statement is not to be judged in isolation, but in conjunction with the statute, *for in the absence of a statute, there would be no authority for demanding any statement 'under penalty of perjury.'*" Appendix, *infra* p. 16a (Emphasis supplied).[8] See also, *Georgia Conf. of AAUP* v. *Board of Regents*, 246 F. Supp. 553, 555 (N. D. Ga., 1965) (Three Judge Court).

[8] Article 85A, Section 17, expressly provides that the penalties of perjury shall apply to "[e]very written statement made pursuant to this article by an applicant for appointment or employment." Sections 11, 13 and 17 specifically provide that such statements "shall contain notice that [they are] subject to the penalties of perjury." Statutory perjury is defined by Section 435 of Article 27 of the Md. Code Annot. (1957).

B. Under long standing constitutional principle and recent decisions of this Court declaring unconstitutionally vague, uncertain and broad statutes of other states that were virtually identical to the Maryland Subversives Activities Act, particularly with respect to definitions, Maryland's statute is unconstitutionally vague, uncertain and broad on its face and as judicially construed, and the "Certification of Applicant for Public Employment" is therefore an invalid condition on public employment.

No principle of due process is better established than that which denies the government the power to enforce "a law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . ." *Baggett* v. *Bullitt*, 377 U. S. 360, 367; see also, *e.g.*, *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; *Winters* v. *New York*, 333 U. S. 507; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Connally* v. *General Construction Co.*, 269 U. S. 385; see generally, *e.g.*, Amsterdam, *The Void for Vagueness Doctrine*, 109 U. PA. L. REV. 67 (1960). It is also well settled that the principle is most strictly applied to statutes having a potentially inhibiting effect on speech, for fear that "the free dissemination of ideas may be the loser". *Smith* v. *California*, 361 U. S. 147, 151; see also *Aptheker* v. *Secretary of State*, 378 U. S. 500. Further, in recent years this Court has expressly ruled that when loyalty oaths and the statutes pursuant to which they are made conditions precedent to public office or employment are unduly vague, uncertain and broad, they inhibit constitutionally protected expression, belief and association and are therefore invalid, *Elfbrandt* v. *Russell*, 384 U. S. 11; *Baggett* v. *Bullitt*, 377 U. S. 360; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; see also, *Georgia Conf. of AAUP* v. *Board of Regents*,

246 F. Supp. 553 (N. D. Ga., 1965) (Three Judge Court); *Brush* v. *State,* Cir. Ct. Lane County, Oregon, October 14, 1965 (currently on appeal to the Oregon Supreme Court); *Hurwitz* v. *Director's Guild of America,* 364 F. 2d 67 (2d Cir. 1966); Morris, *Baggett* v. *Bullitt: Scienter & "Guiltless Knowing Behavior",* 1 LAW IN TRANSITION Q. 185 (1964).

As pointed out earlier, the essential provisions of the subversive activities law of the State of Washington, declared unconstitutional in *Baggett* v. *Bullitt,* 377 U. S. 360, are identical with and were in fact copied from Maryland's Ober Law. As the Court said in *Baggett,* 377 U. S. at 368-370, the statute was unconstitutionally vague, broad and uncertain. See also, *Cramp* v. *Board of Public Instruction,* 368 U. S. 278; *Dombrowski* v. *Pfister,* 380 U. S. 479.

Recently the Court also voided Arizona's loyalty oath for public employees and its accompanying statutory gloss, which penalized mere knowing membership in an organization having as one of its purposes the violent overthrow of government. The Arizona scheme's defect was that it was overly broad, impinging on constitutionally protected freedoms of expression and association, for it applied even "to membership without the 'specific intent' to further the illegal aims of the organization . . ." *Elfbrandt* v. *Russell,* 384 U. S. 11, 19. See also *Aptheker* v. *Secretary of State,* 378 U. S. 500; *compare, Noto* v. *United States,* 367 U. S. 290, *with, Scales* v. *United States,* 367 U. S. 203; *cf. Gibson* v. *Florida Legislative Committee,* 372 U. S. 539, 543-46; *Shelton* v. *Tucker,* 364 U. S. 479. The same defect resides in the Maryland statute as judicially construed in *Shub* v.

Simpson, 196 Md. 177, 76 A. 2d 332 (1950); and *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56. See Article 85A, Sections 1, 3, 10, 11, 13, 14 and 15 of the MD. CODE ANNOT. (1957).

As also pointed out earlier, this is made particularly clear by the fact that in *Shub,* the Maryland Court of Appeals expressly relying on the Second Circuit decision in *United States* v. *Dennis,* 183 F. 2d 201 (2d Cir. 1950), without the limiting clarification later provided by, *e.g., Yates* v. *United States,* 354 U. S. 298; *Scales* v. *United States,* 367 U. S. 203; *Noto* v. *United States,* 367 U. S. 290; see *Baggett* v. *Bullitt,* 377 U. S. 360, 370 n. 8, ruled that the Maryland statute covers those who advocate "the overthrow of the Government of the United States, or of this State, through force or violence . . .", 196 Md. at 190, 76 A. 2d at 337, without restricting coverage to advocacy of action or *active, intentional,* knowing membership in organizations having the purpose of overthrowing or advocating action to overthrow the government. And this Court obviously recognized and approved the overly broad interpretation, by ruling acceptable the oath proffered by the Attorney General of Maryland according to which the affiant attested that he was not "knowingly a member of an organization engaged in such an attempt," *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56-57. The Court thereby approved an oath and statute that are now invalid under current standards for they are "not restricted in scope to those who join [such an organization] with the 'specific intent' to further its illegal action . . ." *Elfbrandt* v. *Russell,* 384 U. S. 11, 17.

"Out of an abundance of caution," see Tr. p. 14, according to the Attorney General of Maryland, immediately follow-

ing the *Elfbrandt* decision, he deleted from the oath administered to applicants for positions with the University, the phrase "knowingly a member of an organization engaged in such an attempt". See Appendix, *infra* p. 33a. This deletion, compelled by *Elfbrandt,* however, was to no avail.

The affiant is still required to certify that he is "not engaged in *one way or another* in the attempt to overthrow the Government . . ." Appendix, *infra* at p. 33a. (Emphasis supplied.) The emphasized phrase, also approved by this Court in *Gerende,* 341 U. S. 56, however, is not self-defining. In fact, to determine what it means, one must turn to the authorizing statute and its judicial interpretation, for without a defining gloss, the phrase unquestionably suffers from just the defect of vagueness the Court found unconstitutional in *Baggett* v. *Bullitt,* 377 U. S. 360, 366-70 (1964),[9] and just the defect of breadth struck down in *Elfbrandt* v. *Russell,* 384 U. S. 11 and *Aptheker* v. *Secretary of State,* 378 U. S. 500, 510-14.

But the statute and the judicial construction that has been placed upon it, do not sufficiently clarify the meaning of the phrase. Quite the contrary, when, for example, asked by Judge Winter at the hearing below, the only definition the Attorney General of Maryland could put on the phrase "in one way or another", was to say:

---

[9] It is noteworthy that in *Baggett* v. *Bullitt,* 377 U. S. 360, 368-69 n. 7, the Court left this phrase out when it quoted the terms of the oath that it said had been found to be acceptable in *Gerende* v. *Board of Supervisors of Elections,* 341 U. S. 56-57. As a matter of fact, in *Gerende,* the Court, quoting from the decision of the Court of Appeals of Maryland, included precisely this phrase in what the Court found to be the "acceptable" affidavit.

> "I think it probably means in any way, or by any available means. I think it means in one way or another, precisely what it says. It's unfortunate that the English language lacks the precision which perhaps we might like it to have, but I think it means just that: In one way or the other, in any way." (Tr. 18).

Appellant submits that if the phrase means anything less expansive than this circular definition, it could only mean advocating "the overthrow of the Government . . . through force or violence . . ." *Shub* v. *Simpson*, 196 Md. 177, 190, 76 A. 2d 332, 337, without limitation to advocacy of action or *active, intentional,* knowing membership, and it is therefore still too broad or vague.[10]

---

[10] The failure of the *Shub* and *Gerende* decisions to clarify the meaning of the Maryland statute can further be seen in the fact that those administering the oath requirement have been unable to settle on a particular and clear certification. Until recently even under the Attorney General's view, the oath required of applicants for public employment was cast in terms that were much broader than those found acceptable by this Court in *Gerende*. Most notably, up to May 3, 1966, after this Court's decision in *Elfbrandt*, the oath approved by the Attorney General required the oath-taker to certify "that I am not a subversive person as defined by law, namely . . ." (followed by the language approved in *Gerende*). (See Tr. 9.) Moreover, at the hearing before the District Court in this case, it developed that various oaths, some very broad, were and still are extracted by various agencies of the State of Maryland and its political sub-divisions, presumably pursuant to Article 85A. (See Tr. 43.) See also § 3(c) of Article 10, MD. CODE ANNOT. (1957) (Qualification for admission to the Bar); Rule Second, Rules Governing Registration of Law Students and Admission to the Bar of Maryland, 9A MD. CODE ANNOT. p. 233 (1957), which says: "The application [for registration as a law student] shall also state that the applicant is not a subversive person as defined by the Subversive Activities Act of 1949." (These rules were adopted by the Court of Appeals of Maryland on June 10, 1955 and amended on January 16, 1958 and July 21, 1965, long after this Court's decision in *Gerende*.)

Even assuming that the recent deletion from the Maryland oath is meaningful, and, also, that under Section 11 of Article 85A, the Attorney General had the authority to eliminate from the oath the phrase "knowingly a member of an organization engaged in such an attempt" and also has the authority to delete the phrase "in one way or another", it is Appellant's contention that the oath would still have to fail. For, as discussed above, the oath must be read and passed upon with its underlying and authorizing statute, and, although the oath may be within his control, the Attorney General has no authority to change the meaning of that judicially construed statute. As Justice Frankfurter said during the very term in which *Gerende* was decided:

> "The Attorney General did not give this assurance [in *Gerende*] as a matter of personal relaxation of a legal requirement. He was able to give it on the basis of the interpretation that the Court of Appeals of Maryland, the highest court of that State, had placed upon the legislation." *Garner* v. *Board of Public Works*, 341 U. S. 716, 727 (Frankfurter, J. concurring).[11]

And when penalties of perjury are provided to enforce oath taking requirements, this Court has made it clear that the fact that the oath itself might be innocuous on its face will not insulate it from examination in the context of the statute authorizing it and providing penalties for its enforcement. *Elfbrandt* v. *Russell*, 384 U. S. 11.

---

[11] In *Georgia Conf. of AAUP* v. *Board of Regents*, 246 F. Supp. 553, 555 (N. D. Ga. 1965) the three judge court said: "The oath which the State School Superintendent has substituted for the oath prescribed in the 1935 statute has not been objected to by plaintiffs, but we say in passing that it seems to be without statutory basis."

Moreover, when penalties of perjury are provided, the Court has recently said that it will not rely on the fairmindedness of prosecutors to limit otherwise unduly vague, uncertain and broad statutes requiring oaths. *Baggett* v. *Bullitt*, 377 U. S. 360 at 373-74; *Elfbrandt* v. *Russell*, 384 U. S. 11; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278, 286-287; see also, *Dombrowski* v. *Pfister*, 380 U. S. 479, 493-94. And as the Court said in *Aptheker* v. *Secretary of State*, 378 U. S. 500, 515, 517-18, the fact that a statute having an inhibiting effect upon First Amendment and other essential personal rights may have been constitutionally applied in the particular case does not insulate it from attack on its face. See also *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98; *NAACP* v. *Button*, 371 U. S. 415, 432-33.

C. The definitional and oath provisions of Article 85A being unconstitutionally vague, uncertain and broad, the entire statute must fall notwithstanding the inclusion in it of a standard severability clause.

Despite Section 18, of Article 85A, the severability provision, the entire statute must fall. It is well established that severability clauses are of no avail when the valid and invalid portions of a statute are so inextricably intertwined, connected and interdependent in subject matter and purpose as to preclude the presumption that the legislature would have passed one portion without the others. On the contrary, when the provisions of a statute are so interrelated the conclusion is compelled that the legislature would not have done so. *E.g., Railroad Retirement Board* v. *Alton R.R.*, 295 U. S. 330, 361-62; *Huebech* v. *City of Baltimore*, 205 Md. 203, 107 A. 2d 99 (1954); SUTHERLAND, STATUTORY CONSTRUCTION, Sections 2418, 2407, 2404 (3rd Ed., 1943).

This is especially true of statutes embodying criminal or penal provisions. See SUTHERLAND, *supra*, Section 2418.

Article 85A is a unified scheme comprised of interdependent provisions, including criminal and penal ones, to control subversive activities in Maryland. See Maryland Senate Joint Resolution No. 2, Special Session, 1948 LAWS OF MARYLAND 158 (1948 Extraordinary Session); REPORT OF THE COMMISSION ON SUBVERSIVE ACTIVITIES TO GOVERNOR WILLIAM PRESTON LANE, JR., AND THE MARYLAND GENERAL ASSEMBLY (January, 1949); 1949 LAWS OF MARYLAND 96, *et seq.* (setting forth the Act's preamble); see also, Prendergast, *Maryland: The Ober Anti-Communist Law*, in THE STATES AND SUBVERSION 140 (Gellhorn, ed. 1952). At the heart of Maryland's anti-subversion statute are the definitions contained in Section 1. Every other significant section of the statute depends on and makes reference to these definitions, which under *Baggett* v. *Bullitt*, 377 U. S. 360 and *Elfbrandt* v. *Russell*, 384 U. S. 11, constitute the major defect in the statute. It is therefore clear that notwithstanding the severability clause, the entire statute as construed, not only the oath and the provisions providing for it, must fall.

II.

Loyalty oaths, including Maryland's, that are indiscriminately required of all public employees and applicants for public employment, particularly teachers, are unconstitutional infringements on freedom of expression, belief, association, and academic freedom in violation of the First and Fourteenth Amendments of the United States Constitution.

The indiscriminate requirement of a loyalty oath as a condition of public employment violates the due process clause of the Fourteenth Amendment and through it the First Amendment to the United States Constitution by unduly infringing upon the protected freedoms of expression, conscience, belief, religion, association, and academic freedom.

The case at bar differs fundamentally from most past cases decided by this Court dealing with related areas. One significant distinction is that this case does not involve any orderly inquiry or questioning by state officials seeking relevant information.[12] The Appellant has not been asked to specify, particularize, elaborate, discuss or even present facts or data bearing on his fitness as a teacher. What he is required to do is to make one and only one response to a question that assumes general irresponsibility—and the correct answer has been prescribed by the legislature. Failure to make answer or to give the prescribed one has automatically barred the Appellant from teaching at the Uni-

---

[12] It requires no elaboration that there are limitations, in the interest of the First Amendment, on even this kind of state activity, and that repressive means of securing legitimate ends must fall if means less restrictive of First Amendment interests are available. See *Shelton* v. *Tucker*, 364 U. S. 479.

versity of Maryland despite the fact that he would have been a valuable addition to the faculty of the University.[13]

The case of *Adler* v. *Board of Education*, 342 U. S. 485, in which New York's Feinberg Law was upheld in a declaratory judgment proceeding, is not dispositive of the present case. First, failure to execute the required certification was, under New York law, only *prima facie* evidence of disqualification. Moreover, the New York law, unlike Maryland's, made substantial provision for "full hearing with the privilege of being represented by counsel and the right to judicial review" before an applicant was denied employment. 342 U. S. at 490-91.[14]

---

[13] The lack of any legitimate intention to gather information from particular persons dealing with their competency distinguishes this case from *Beilan* v. *Board of Education*, 357 U. S. 399. It also distinguishes this case from such cases as *Lerner* v. *Casey*, 357 U. S. 468; *Nelson* v. *Los Angeles County*, 362 U. S. 1; *Konigsberg* v. *State Bar of California*, 353 U. S. 252; *Konigsberg* v. *State Bar of California*, 366 U. S. 36; *In re Anastoplo*, 366 U. S. 82. In addition, none of these five cases involved school teachers. The first two involved other kinds of municipal employees and the last three involved admission to the Bar. The significance of this distinction is taken up *infra* in the text.

[14] As Judge Sobeloff said in his special concurrence in the case at bar, Appendix *infra* at p. 17a note, the present New York law, which this Court currently has under review, continues to carry these or additional limitations:

> "Keyishian v. Board of Regents, —— F. Supp. —— (W. D. N. Y. Jan. 5, 1966); prob. juris. noted, 384 U. S. 998 (1966), decided prior to the Supreme Court's decision in *Elfbrandt*, may be distinguishable from the case at bar. There is no New York equivalent to the 'loyalty pledge' subject to penalties for perjury, that is before us today. Furthermore, as the three-judge district court emphasized, New York State, in requiring of a prospective employee the assurance that he has complied with the laws under attack in *Keyishian*, affords the applicant an opportunity to be heard, should he be in doubt as to the coverage of the statutes."

Adler is further not dispositive of the present case because it was decided under the now discredited doctrine that public employment is a privilege as opposed to a right. The great growth of government activity, the multiplication of the categories of people in government employment and the ever increasing absolute and relative number of people on federal, state and local government payrolls dictate the reality that government employment cannot be treated in law as a mere privilege. Indeed, in a significant line of cases since *Adler*, the Court has recognized this fact of our social, political and economic life. As the Court said in *Wieman* v. *Updegraff*, 344 U. S. 183, 192 (1952), "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." Or as the Court more recently said in *Torcasso* v. *Watkins*, 367 U. S. 488, 495-96, "The fact, however, that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution." See also, *Elfbrandt* v. *Russell*, 384 U. S. 11; *Baggett* v. *Bullitt*, 377 U. S. 360; *Cramp* v. *Board of Public Instruction*, 368 U. S. 278; *Shelton* v. *Tucker*, 364 U. S. 479; *Heckler* v. *Shepard*, 243 F. Supp. 841 (E. D. Idaho, 1965) (Three-Judge Court); *Keyishian* v. *Board of Regents*, 345 F. 2d 236, 239 (2d Cir. 1965).[15]

---

[15] In these and additional cases, the Court has disclosed that unconstitutional conditions may not be interposed on the enjoyment of interests that traditionally had been classified as mere "privileges", evincing a general breakdown in the conceptualistic "privilege-right" dichotomy. See, *e.g.*, *Lamont* v. *Postmaster General*, 381 U. S. 301; *Schneider* v. *Rusk*, 377 U. S. 163; *Sherbert*

When this developing principle of affording protection to persons seeking to obtain or retain public employment is viewed in the light of the Court's increasing emphasis on the freedoms protected by the First Amendment, see, *e.g.*, *De Gregory* v. *Attorney General of New Hampshire*, 383 U. S. 825; *New York Times Co.* v. *Sullivan*, 376 U. S. 254; *Gibson* v. *Florida Legislative Committee*, 372 U. S. 539, freedoms upon which across-the-board loyalty oaths encroach so dangerously, it becomes apparent that the basis for *Adler* has been removed. Similarly undermined by these developments has been *Garner* v. *Board of Public Works*, 341 U. S. 716, in which a loyalty affidavit requirement of the City of Los Angeles was upheld. In addition, the *Garner* decision relied heavily on an understanding of the prohibition against bills of attainder that no longer has vitality. See *United States* v. *Brown*, 381 U. S. 437, discussed *infra* under point IV.

Besides *Garner's* lack of continued vitality, it is also distinguishable from the case at bar. The present case, brought by a teacher, presents issues of freedom of speech and conscience in one of the most significant and sensitive contexts, that of academic freedom. As Henry Steele Commager, the distinguished historian, has so eloquently written:

> "Freedom is guaranteed to the scholar so that he will be able to inspire in the young a passion for truth, and so that he can present to them, in his own life and conduct, an example of the search for truth. It is guaranteed to the scholar so that he can train new generations

---

v. *Verner*, 374 U. S. 398; *Speiser* v. *Randall*, 357 U. S. 513; see also, *e.g.*, *Lawson* v. *Housing Authority of Milwaukee*, 270 Wis. 269, 70 N. W. 2d 605, *cert. denied*, 350 U. S. 882.

of technicians and public servants who will freely exercise their intelligence on behalf of their society. It is guaranteed to the scholar so that he can engage, fearlessly and vigorously, in pushing outward the boundaries of knowledge in every field.

Academic freedom is, like other freedoms, a device for avoiding error and arriving at truth. We take this for granted in the realm of science. We should take it equally for granted in the realm of social thought." Commager, *Is Freedom an Academic Question?*, Saturday Review, June 20, 1964, 54, 56.

This court has long recognized the important constitutional dimension of academic freedom. In *Barenblatt* v. *United States*, 360 U. S. 109, 112, the Court said: "Of course, broadly viewed, inquiries cannot be made into the teaching that is pursued in any of our educational institutions. When academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion by Congress into this constitutionally protected domain." In an earlier case, still subsequent to *Garner* and *Adler*, four Justices speaking for the Court further addressed the thorny questions of academic freedom and attested to that freedom's overwhelming importance and scope, saying:

"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so

> thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die." *Sweezy* v. *New Hampshire,* 354 U. S. 234, 250.[16]

See also, *e.g.,* EDUCATIONAL FREEDOM IN AN AGE OF ANXIETY (Hullfish, ed., 1953); MACIVER, ACADEMIC FREEDOM IN OUR TIME (1955); LAZARSFELD AND THIELENS, THE ACADEMIC MIND (1958); Morris, *Academic Freedom and Loyalty Oaths,* 28 LAW AND CONTEMPORARY PROBLEMS 487 (1963); Murphy, *Academic Freedom—An Emerging Constitutional Right,* 28 LAW AND CONTEMPORARY PROBLEMS 447 (1963). The Court in the *Sweezy* case clearly recognized and gave protection to academic liberty which is at the core of the First Amendment. Thus coming out of that Amendment is a preferred position for intellectual freedom. Unjustified

---

[16] Justice Frankfurter, in his important concurring opinion to *Wieman* v. *Updegraff,* 344 U. S. 183, 195, also stressed the peculiar legal significance of academic freedom saying: "By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards to those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers."

encroachment on this freedom or liberty by such requirements as are provided by Article 85A cannot be tolerated and are clearly unconstitutional.

The earlier cases upholding across-the-board loyalty tests must also be viewed in the light of the development into an inescapable principle that "[w]here there is a significant encroachment upon personal liberty [particularly that protected by the First Amendment], the State may prevail only upon showing a subordinating interest which is compelling." *Bates* v. *Little Rock*, 361 U. S. 516, 524.[17] It is now clear that in these cases it is the state which must carry the burden of showing a substantial relationship between its regulation, prohibition or demand and a subject of overriding and compelling state interest. *E.g.*, *Gojack* v. *United States*, 384 U. S. 702; *De Gregory* v. *Attorney General of New Hampshire*, 383 U. S. 825; *Gibson* v. *Florida Legislative Committee*, 372 U. S. 539; *Sweezy* v. *New Hampshire*, 354 U. S. 234; *cf. Griswold* v. *Connecticut*, 381 U. S. 479.

Although *Bates*, *Gojack*, *De Gregory*, *Gibson* and *Sweezy*, all dealt with legislative investigations, the principle they established, as to state's burden of showing compelling and subordinating interests to impinge First Amendment rights, is equally applicable to the realm of loyalty oaths. *Lawson* v. *Housing Authority of Milwaukee*, 270 Wis. 269, 70 N. W. 2d 605 (1955), *cert. denied*, 350 U. S. 882.

During the fifteen years that Maryland has had its Ober Law and oath, the state has prosecuted no one for sub-

[17] Notably, this was not the test applied by the Maryland Court of Appeals in *Shub* v. *Simpson*, 196 Md. 177, 195, 76 A. 2d 332, 340 (1950). In upholding the Ober Law, the Maryland court viewed it through "a presumption in favor of its validity."

versive activities and no one has been discharged on this ground. *Cf. Poe* v. *Ullman*, 367 U. S. 497. Several conscientious people have been denied employment or discharged because they refused to execute the test oath. See, *e.g.*, Prendergast, *Maryland: The Ober Anti-Communist Law*, in THE STATES AND SUBVERSION (1952, Gellhorn, ed.) at 140, 169-170. No doubt a larger number of conscientious and qualified persons has decided not to enter the state's employ because they abhor test oaths—much to the state's loss. Weighing the ineffectiveness of the Ober Law and oath against the tragically inhibiting effect of such oaths and laws, particularly with respect to teachers, see, *e.g.*, LAZARSFELD AND THIELENS, THE ACADEMIC MIND 84-85, 192, 197, 204, 240, *passim* (1958), on the preferred First Amendment freedoms, and considering that the state can achieve its legitimate ends in less stultifying ways, *Shelton* v. *Tucker*, 364 U. S. 479, 488, for example through the ordinary criminal processes or through systems of specific inquiry when reasonable ground exists for questioning loyalty, the conclusion is compelled that oaths such as Maryland's, and the statutes that require them, are unconstitutional conditions on public employment.

III.

The Maryland Subversive Activities Act of 1949 and the "Certification of Applicant for Public Employment", required pursuant to it, infringe upon freedom of expression, belief and association, for lack of adequate procedural safeguards, by denying public employment without affording a hearing on the issue of loyalty or subversiveness and by shifting the burdens of proof of loyalty onto applicants, in violation of due process of law.

Under Article 85A, upon refusing to execute the required "Certification of Applicant for Public Employment", the Appellant (and all others similarly situated) was automatically rendered ineligible for public employment. The statute makes no provision for a hearing at which the Appellant would be afforded an opportunity to explain his reason for refusing to execute the oath. *Compare Heckler* v. *Shephard,* 243 F. Supp. 841 (E. D. Idaho, 1965) (Three Judge Court declaring Idaho law, not providing such hearings, unconstitutional), *with, Keyishian* v. *Board of Regents,* —— F. Supp. ——, Civil Action No. 10,994 (W. D. N. Y. Jan. 5, 1966) (Three Judge Court upholding New York law with provisions for such hearings), *probable jurisdiction noted,* 384 U. S. 998. Numerous circumstances can be conceived, moreover, which would cause a person to refuse to execute the oath, required under this statute, and which would in no way reflect on the person's loyalty or fitness for the job. For example, a person might be associated with a "subversive organization" or "in one way or another engaged in the attempt to overthrow the Government" for purposes of counter-espionage or for scholarly

or other field study. *Compare, e.g., Aptheker* v. *Secretary of State,* 378 U. S. 500, 511-12; *Baggett* v. *Bullitt,* 377 U. S. 360, 367-70. In addition, as is the case here, a person might refuse to execute this oath on conscientious grounds or because he finds it offensive or insulting. See, *e.g., Torcaso* v. *Watkins,* 367 U. S. 488; *Sherbert* v. *Verner,* 374 U. S. 398; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; *cf., e.g., De Gregory* v. *Attorney General of New Hampshire,* 383 U. S. 825.

In *Slochower* v. *Board of Education of New York,* 350 U. S. 551, 559, the Court said:

> "The State has broad powers in the selection and discharge of its employees, and it may be that proper inquiry would show Slochower's continued employment to be inconsistent with a real interest of the State. But there has been no such inquiry here. We hold that the summary dismissal of appellant violates due process of law."

Accord, Heckler v. *Shepard,* 243 F. Supp. 841 (E. D. Idaho, 1965) (Three Judge Court); see also, *Nelson* v. *Los Angeles County,* 362 U. S. 1, 8 n. 5; *Nostrand* v. *Little,* 362 U. S. 474, 475, *on remand,* 58 Wash. 2d 111, 361 P. 2d 551, 566-567 (1961), *appeal dismissed, per curiam,* 368 U. S. 436; *Baggett* v. *Bullitt,* 377 U. S. 360, 384 (Clark and Harlan, *J.J.,* dissenting); *cf. Konigsberg* v. *State Bar of California,* 366 U. S. 36; *In re Anastaplo,* 366 U. S. 82. And in recent cases concerning control of obscenity, the Court has made further clear the importance of hearings when First Amendment rights may be jeopardized by government action. See, *e.g., A Quantity of Books* v. *Kansas,* 378 U. S. 205; *Bantam Books* v. *Sullivan,* 372 U. S. 58; *Marcus* v. *Search Warrant,*

367 U. S. 717. *Cf. Kennedy* v. *Mendoza-Martinez*, 372 U. S. 144; *Schneider* v. *Rusk*, 377 U. S. 163 (by implication).

Maryland's loyalty oath and the statutory provisions pursuant to which it is required as a condition to public employment may, although it is unlikely, exclude some disloyal or otherwise unfit employees, but it certainly also excludes loyal and fit employees, who are highly conscientious and sensitive, without according them any opportunity to explain their refusals to execute the oath. Such indiscriminate classification of the innocent with knowing activity offends due process of law. *E.g.*, *Wieman* v. *Updegraff*, 344 U. S. 183; *Elfbrandt* v. *Russell*, 384 U. S. 11. A meaningful opportunity must be afforded an employee, or a potential employee, *cf. Torcaso* v. *Watkins*, 367 U. S. 488; Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW AND CONTEMPORARY PROBLEMS 447, 481-484 (1963), to prove his fitness despite his refusal to take the oath. See, *e.g.*, *Slochower* v. *Board of Education of New York*, 350 U. S. 551; *Heckler* v. *Shepard*, 243 F. Supp. 841 (E. D. Idaho, 1965) (Three Judge Court). No such opportunity is provided the applicant for employment under Maryland's Subversive Activities Law of 1949. See Article 85A, Sections 11 and 13.

In *Speiser* v. *Randall*, 357 U. S. 513, this Court struck down a California oath which was required before property owners could qualify for a tax exemption. The Court held that since the oath infringed upon freedom of expression, and, since it did so by using a procedure that placed "the burdens of proof and persuasion on the taxpayer [it was] . . . a violation of due process of law." 357 U. S. at 529. "Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due

process, appellants were not obliged to take the first step in such a procedure," *ibid,* namely, to execute the oath as a condition of obtaining a tax exemption.

Speiser applies to this case in at least two ways. On the one hand, the Appellant here has been required, as the appellants were in *Speiser,* to take the first step, execution of the oath, in an invalid series of steps which are procedurally defective, namely, they deprive the Appellant of due process because, as pointed out above, the Maryland Subversive Activities Law does not offer any hearing to an applicant who declines to execute the oath or who desires a clarification of its meaning. There can be no doubt of the burden on free expression in this case. Secondly, as in *Speiser,* there is a shifting of the burdens of persuasion and proof, under the threat of perjury prosecution and loss or refusal of employment, which achieve the same practical, but constitutionally forbidden result: The deterrence of free expression which was disallowed in *Speiser.* In that case, the Court stated:

> "The vice of the present procedure is that, when particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, *cf., Dennis* v. *United States, supra,* provide but shifting sands on which the litigant must maintain his position. How can

a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the state could not command directly. It can only result in a deterrence of speech which the constitution makes free." 357 U. S. at 526.

The philosophy of the *Speiser* decision was followed by the Court in *Freedman* v. *Maryland,* 380 U. S. 51, where it was held that the burden of going forward with the evidence and of persuasion that a motion picture is censorable must be placed on the censor. *Cf. also, Smith* v. *California,* 361 U. S. 147. The same basic problem was also handled by this Court in *Lamont* v. *Postmaster General,* 381 U. S. 301, 307, where the Court held that the requirement that " . . . the addressee in order to get his [allegedly foreign political propaganda] mail must request in writing that it be delivered . . . amounts in our judgment to an unconstitutional abridgement of the addressee's First Amendment rights."

Maryland's loyalty oath, and the statute under which it is required, clearly places the burdens of persuasion and proof onto Appellant, and others similarly situated, necessarily resulting in an undue deterrence of speech which the Constitution makes free. The Maryland scheme presumes the guilt, and non-employability of all persons, presuming either that they advocate the prohibited doctrines or that they are mere knowing members of the prohibited organizations or that they are active and violent revolutionaries. If and only if an affiant comes forward and executes the expurgatory oath may he become a member of the favored group, the group eligible for state employment. The oath is exacted from all alike—the loyal and disloyal.

In other words, the oath presumes non-employability and then shifts onto applicants the task of understanding the complex statutory definitions of subversion and then, without opportunity for hearing, requires applicants to make their declarations. This act and oath, also, therefore, are "at war with . . . the First Amendment." *Lamont* v. *Postmaster General,* 381 U. S. 301, 307. And, as the Court recently said in *Elfbrandt* v. *Russell,* 384 U. S. 11, 17-18: "The unconstitutionality of this Act follows *a fortiori* from *Speiser* v. *Randall,* 357 U. S. 513, where we held that a State may not even place on an applicant for a tax exemption the burden of proving that he is not engaged in criminal advocacy."

IV.

The required "Certification of Applicant for Public Employment" and the statute pursuant to which it is given constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution.

The provisions of Article 85A and oath given pursuant to it constitute a Bill of Attainder in violation of Article I, Section 10 of the United States Constitution. The oath in question is a test oath, punishing Appellant and others similarly situated, legislatively without any adjudicatory process. The oath functions to deprive otherwise fully qualified and competent employees and applicants for employment of their employment, good consciences, professional integrity and political rights.

In *Cummings* v. *Missouri,* 71 U. S. (4 Wall.) 277, 320, the Court held: "The deprivation of any rights, civil or political, previously enjoyed, may be punishment . . ." and that statutory or state constitutional provisions having that

effect constituted bills of attainder. At issue, and struck down, in the particular case were state constitutional provisions that required the taking of a test oath as a condition of, among other things, holding public office or employment or voting. See also *Ex parte Garland*, 71 U. S. (4 Wall.) 333. In *United States* v. *Lovett*, 328 U. S. 303, denial of compensation for federal employment was also held a sufficient deprivation to invalidate a statute as a bill of attainder.

It is true that the Court has more recently several times rejected the attainder argument in loyalty oath cases. *E.g.*, *Garner* v. *Board of Public Works*, 341 U. S. 716, 722-23. But recently there has been considerable change in the law relating to bills of attainder. In *United States* v. *Brown*, 381 U. S. 437, the Court struck down the provisions of the federal Landrum-Griffin Act which made it criminal for Communists to hold leadership positions in labor unions. Whatever may have been the purpose of the disqualification, and despite the absence of any disqualification of named persons, the Court found the whole scheme violative of the attainder clause of the Constitution. The relevance of that case to the present one is significant. After a careful review of the ingredients of the Bill of Attainder decisions, one commentator recently concluded that disclaimer-type loyalty oaths, viewed in the contexts of their authorizing statutes, raise serious attainder problems:

> "Such oaths contain the three elements necessary for a finding of a bill of attainder. The individuals subject to the sanctions of such oaths are identified with the required specificity, since it is only members of politically unpopular organizations who suffer the deprivations prescribed under the oath. The sanction imposed—disqualification from a particular job—is

punishment appropriate in a bill of attainder context. And the sanction is imposed automatically, without judicial intervention. The person who cannot truthfully subscribe to the oath is denied employment." Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 Calif. L. Rev. 212, 250-51 (1966).

Thus the fact that criminal punishment does not follow is no longer dispositive of the attainder question; a loyalty test which carries the sanction of loss or denial of employment may be just as much a bill of attainder as one which imposes the sanction of imprisonment or loss of life. Although this Court has not yet invalidated a loyalty oath on attainder grounds, there has been no warrant for this Court to reach the question in any of its recent cases. But any oath which passes muster against other constitutional attacks, must today withstand additional scrutiny on attainder grounds. The Ober Oath and its authorizing statute cannot, as we have already argued, survive the other constitutional arguments raised. But even if it could, that oath nevertheless represents an unconstitutional bill of attainder.

CONCLUSION

As discussed above, examination of the recent decisions of this Court raises serious constitutional doubts as to the validity of Maryland's loyalty oath requirement, and the statute that makes it a condition precedent to public employment, and subjects to question the current status of this Court's 1951 decision in *Gerende*, upholding the Maryland oath and the authorizing law. Arising in a context in-

volving a detrimental incursion into the protected province of academic freedom, this case therefore presents substantial federal questions that merit the full consideration of this Court.

Respectfully submitted,

SANFORD JAY ROSEN
University of Maryland Law School
500 West Baltimore Street
Baltimore, Maryland 21201

ARNOLD M. WEINER
1215 Maryland National Bank Bldg.
Baltimore, Maryland 21202

ELSBETH LEVY BOTHE
41 West Preston Street
Baltimore, Maryland 21201

JOSEPH S. KAUFMAN
1215 Maryland National Bank Bldg.
Baltimore, Maryland 21202

Attorneys for Appellant

LEE M. MILLER
1100 One Charles Center
Baltimore, Maryland 21202
Of Counsel

November 1966